



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2017-0290; FRL-8942-01-R3]

Air Plan Partial Disapproval; Commonwealth of Pennsylvania; Reasonably Available Control Technology Regulations for the 1997 and 2008 Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: As a result of the Third Circuit Court of Appeals' decision, dated August 27, 2020, in *Sierra Club v. U.S. EPA*, No. 19-2562 (3rd Cir. 2020), the Environmental Protection Agency (EPA) is proposing to partially disapprove a specific part of a state implementation plan (SIP) revision that had been previously approved by EPA. On May 19, 2019, EPA fully approved certain parts of a SIP revision submitted by the Commonwealth of Pennsylvania to address reasonably available control technology (RACT) for the 1997 and 2008 ozone national ambient air quality standards (NAAQS), and conditionally approved other parts of that submission. The court vacated EPA's approval of a portion of the SIP revision, as discussed below, and ordered that EPA either approve a new SIP revision addressing the court's decision or promulgate a federal implementation plan (FIP) within two years. EPA is therefore proposing to disapprove the portion of the SIP submission addressed by the court's decision. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2017-0290 at <https://www.regulations.gov>, or via email to gordon.mike@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once

submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **For Further Information Contact** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Dave Talley, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2117. Mr. Talley can also be reached via electronic mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION: On May 16, 2016, the Pennsylvania Department of Environmental Protection (PADEP) submitted a revision to its SIP for RACT Regulations for the 1997 and 2008 ozone NAAQS.

I. Background

On May 9, 2019, EPA published a final action fully approving certain provisions of Pennsylvania's May 16, 2016 SIP revision submission to implement RACT for both the 1997 and 2008 Ozone NAAQS (hereafter the "RACT II rule"), and conditionally approving other provisions of the SIP revision. 84 FR 20274 (May 9, 2019). Specifically, EPA's action fully approved "25 Pa. Code sections 121.1, 129.96, 129.97, and 129.100 as meeting certain aspects of

major stationary source RACT in CAA section 172, 182, and 184 for the 1997 and 2008 ozone NAAQS submitted May 16, 2016” and conditionally approved “25 Pa. Code sections 129.98 and 129.99 based on the commitment provided by Pennsylvania to submit additional SIP revisions to address the deficiencies identified by EPA in the May 16, 2016 SIP revision.” *Id.* at 20290. The RACT requirements in CAA section 182(b)(2) apply to all ozone nonattainment areas classified as Moderate or higher (Serious, Severe, or Extreme). Section 184(b)(1)(B) of the CAA also applies RACT to all areas located within ozone transport regions established pursuant to section 184 of the CAA. The entire Commonwealth of Pennsylvania is part of the Ozone Transport Region (OTR) established under section 184 of the CAA and therefore subject statewide to the RACT requirements. The May 16, 2016 SIP submittal was intended to satisfy CAA sections 182(b)(2)(C), 182(f), and 184 for the 1997 and 2008 8-hour ozone NAAQS for all major sources of nitrogen oxides (NO_x) and volatile organic compounds (VOCs) in Pennsylvania not subject to control techniques guidelines (CTG), with a few exceptions not relevant to this action.

The Sierra Club commented on EPA’s proposed approval of the RACT II rule, and following EPA’s final approval, filed a petition for review with the U.S. Third Circuit Court of Appeals. The petition challenged EPA’s approval of that portion of the RACT II rule applicable to coal-fired electricity generating units (EGUs) equipped with selective catalytic reduction (SCR) for control of NO_x, which is a precursor pollutant to ozone regulated under CAA section 182. Specifically, the petition challenged EPA’s approval of the presumptive RACT NO_x limit for these EGUs of 0.12 pounds of NO_x per Million British Thermal Units (MMBtu) of heat input (lbs/MMBtu) when the inlet temperature to the SCR was 600 degrees Fahrenheit or above, found at 25 Pa. Code 129.97(g)(1)(viii); the application of the less stringent NO_x limits of 25 Pa Code 129.97(g)(1)(vi) to EGUs with SCR when the inlet temperature to the SCR was below 600 degrees Fahrenheit;¹ and the failure of the RACT II rule at 25 Pa. Code 129.100(d) to

¹ 25 Pa Code 129.97(g)(1)(vi) applies to coal-fired combustion units with a heat input greater than 250 million MMBtu/hr that do not have SCR.

specifically require these EGUs to keep temperature data for the inlet temperature to the SCRs and report that data to PADEP.

On August 27, 2020, the Third Circuit found for the Sierra Club on all three of these issues, vacated the Agency's approval of the SIP submission on each of these three pieces of the Pennsylvania plan as it pertained to coal-fired EGUs equipped with SCRs, and remanded to the Agency. The court further stated that "[o]n remand, the agency must either approve a revised, compliant SIP within two years or formulate a new federal implementation plan." *Sierra Club*, 972 F.3d 290, 309 (3d Cir. 2020).

II. Summary of SIP Provisions Being Proposed for Disapproval

The purpose of this action is to propose a partial disapproval for those portions of Pennsylvania's RACT II SIP for which the Third Circuit vacated EPA's approval. In light of the court's order regarding EPA actions on remand, EPA is proposing this action in part to ensure that we have authority to promulgate a FIP if Pennsylvania does not submit a timely or approvable SIP revision addressing the Third Circuit's decision.

The specific section of Pennsylvania's regulation in the SIP that is at issue here is 25 Pa. Code 129.97(g)(1)(viii), which sets a "presumptive" RACT limit for coal-fired combustion units equipped with SCR. The court held that EPA's approval of 25 Pa. Code 129.97(g)(1)(viii) was arbitrary and capricious because the record did not support EPA's finding that the emission limit of 0.12 lb NO_x/MMBtu of heat input was RACT for these EGU sources, particularly in light of submitted evidence that EGUs in Pennsylvania regulated by 25 Pa. Code 129.97(g)(1)(viii) had achieved much lower emission rates for NO_x in the past, and that other states had adopted lower RACT NO_x limits for coal-fired sources. *Sierra Club* at 299-303. In addition, the court held that EPA's approval of the 600 degree Fahrenheit temperature "exemption" to the 0.12 lb/MMBtu limit for NO_x in 25 Pa Code 129.97(g)(1)(viii) was arbitrary and capricious because the record failed to support the need for the 600 degree exemption or explain why 600 degrees was chosen as the threshold for the exemption. *Id.* at 303-307. Thus, the court vacated EPA's

approval of these two provisions, both of which are only found in 25 Pa. Code 129.97(g)(1)(viii). See *Id.* at 309.

Regarding the reporting and record keeping requirement of 25 Pa. Code 129.100(d), the court also found EPA's approval of the specific SIP revisions discussed above to be arbitrary and capricious based upon the lack of a specific record keeping and reporting requirement for the 600 degree inlet temperature exemption to the SCR. See *Id.* Specifically, the court held that "[b]ecause the SIP's 600-degree threshold necessarily depends upon accurate temperature reporting, the EPA's approval of such inadequate requirements on this record was arbitrary and capricious." *Id.* at 309. Lacking evidence in the record that this language would require sources subject to 25 Pa. Code 129.97(g)(1)(viii) to keep specific SCR temperature inlet data, report that data to PADEP, and make it available to the public, the court agreed with the Sierra Club that in this scenario the terms are too vague to be enforceable. *Id.* at 308. Further, the court explained that "[t]he combination of this lack of mandatory reporting and the temperature waiver created a potent loophole for polluters to walk through." *Id.* at 297. For these reasons, EPA now finds that the previously approved recordkeeping and reporting provisions are inadequate in this specific context, which further supports this proposed partial disapproval.

EPA has been and will continue to work with PADEP to address revised RACT determinations during the state's development of the SIP revision in response to the court decision.

III. Proposed Action

Consistent with the Third Circuit's decision, and based on the reasoning contained therein, EPA is proposing under CAA section 110(k)(3) to revise its full approval of certain provisions of the Pennsylvania RACT II rule that were vacated and remanded to EPA by the Third Circuit Court of Appeals. EPA's proposed partial disapproval of this previously-approved SIP revision is limited to the regulatory provision related to presumptive RACT requirements for coal-fired combustion units at EGUs equipped with SCR, specifically 25 Pa. Code

129.97(g)(1)(viii). Because we are now proposing to disapprove 25 Pa. Code 129.97(g)(1)(viii), and the 600 degree temperature threshold along with the 0.12 lbs/MMBtu limit is contained entirely within this section, no additional federal regulatory revisions are necessary to address the court's holding that EPA's approval of the record-keeping requirement was arbitrary and capricious.

Section 110(c)(1) of the CAA requires the Administrator to promulgate a FIP at any time within two years after the Administrator finds that a state has failed to make a required SIP submission, finds a SIP submission to be incomplete, or disapproves a SIP submission, unless the state corrects the deficiency, and the Administrator approves the SIP revision, before the Administrator promulgates a FIP. Therefore, if EPA finalizes this proposed partial disapproval, EPA will be obligated under CAA section 110(c)(1) to promulgate a FIP within two years after the effective date of the partial disapproval, unless the State submits and the EPA approves SIP revisions to correct the identified deficiencies in the RACT II rule before EPA promulgates the FIP. Notwithstanding this timeframe established under CAA section 110(c)(1) for EPA's promulgation of a FIP, the Third Circuit has ordered the EPA to issue a FIP within two years of the date of its decision in *Sierra Club*, 972 F.3d 290, 309 (3rd Cir., August 27, 2020), if the Agency has not approved a SIP correcting the identified deficiencies in the RACT II rule within this timeframe. In addition, final partial disapproval would trigger mandatory sanctions under CAA section 179 and 40 CFR 52.31 unless the State submits, and EPA approves, SIP revisions that correct the identified deficiencies in the RACT II rule within 18 months of the effective date of the final partial disapproval action.

EPA is soliciting public comments on our proposed partial disapproval as explained herein. We will accept comments from the public on this proposal for the next 30 days.

IV. Statutory and Executive Order Reviews

Executive Orders 12866 and 13563: Regulatory Planning and Review

Under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), this action is not a “significant regulatory action” and, therefore, is not subject to review by the Office of Management and Budget.

Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

Paperwork Reduction Act

This rulemaking does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

This action merely proposes to disapprove state requirements as not meeting Federal requirements and imposes no additional requirements beyond those imposed by state law.

Accordingly, the Administrator certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rulemaking proposes to disapprove pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely

proposes to disapprove a state requirement and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rulemaking does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rulemaking also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it proposes to disapprove a state rule.

Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use.

Because it is not a “significant regulatory action” under Executive Order 12866 or a “significant energy action,” this action is also not subject to Executive Order 13211. (66 FR 28355, May 22, 2001).

National Technology Transfer Advancement Act

In reviewing state submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a state submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a state submission, to use VCS in place of a state submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Executive Order 12898: Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA.

Accordingly, this action proposing partial disapproval of Pennsylvania's RACT regulations for the 1997 and 2008 ozone NAAQS, merely disapproves certain state requirements for inclusion into the SIP under section 110 of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 8, 2021

Diana Esher,
Acting Regional Administrator,
Region III.